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No. 03-1592

IN THE

Supreme Court of the United States

PREWITT ENTERPRISES, INC., *et al.*,
Petitioners,

v.

ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Federal Rule of Civil Procedure 4(f)(3) provides that a district court "may" direct service by means other than those provided by Rule 4(f)(1) and (2). The question presented is whether the district court abused its discretion when it denied a post-judgment motion to serve the Organization of the Petroleum Exporting Countries ("OPEC") at its Vienna headquarters without consent, where such service was prohibited by, and would have caused a substantial affront to, Austrian law.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Prewitt Enterprises, Inc. ("Prewitt"), the appellant below, represents a certified plaintiff class of U.S. consumers of refined petroleum products (except federal judges). D. Ct. Doc. 12; *see* Pet. 4 ("the district court . . . certified a class").

Respondent OPEC, the appellee below, is an inter-governmental organization founded by treaty in 1960. Its membership consists of eleven sovereign states. OPEC's headquarters are located in Vienna, Austria.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 353 F.3d 916. The opinions of the district court (Pet. App. 24a-39a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2003. Prewitt's request for rehearing was denied on March 2, 2004. The petition for a writ of certiorari was filed on May 25, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

RULES INVOLVED

Rule 4(f)(3) of the Federal Rules of Civil Procedure provides:

> **(f) Service Upon Individuals in a Foreign Country.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States: (3) by other means not prohibited by international agreement as may be directed by the court.

The full text of Rule 4(f) is set out at Pet. App. 40a-41a. Rule 4(h), which extends Rule 4(f) to service on "unincorporated associations," is set out at App., *infra*, 1a.

FOREIGN LAW INVOLVED

The Agreement between OPEC and the Republic of Austria Regarding the Headquarters of OPEC (Art. 5(2)) is set forth at Pet. App. 46a. The Austrian Law on Service of Legal Documents (¶ 11(2)) is set forth at App., *infra*, 2a.

STATEMENT

Austrian law forbids service of process on OPEC at its Vienna headquarters absent the express consent of OPEC's Secretary General. The district court denied Prewitt's post-judgment motion to serve OPEC at its Vienna headquarters by alternative means under Federal Rule of Civil Procedure 4(f)(3), which allows for the possibility of such service in a foreign country "as may be directed by the [district] court." The court of appeals affirmed the district court's order as within the discretion Rule 4(f)(3) provides on the record presented. In so ruling, the court of appeals gave appropriate respect to Austrian sovereignty in the particular circumstances of this case. Its decision is correct as a matter

of law, creates no conflict with a decision of any other circuit, and does not merit review by this Court.

Constitution and Headquarters of OPEC

In 1960, a treaty among five sovereign nations created OPEC as a "permanent intergovernmental organization." OPEC now has eleven members, each a sovereign state. The purposes for which OPEC was created include "the co-ordination and unification of the petroleum policies of Member Countries and the determination of the best means for safeguarding their interests, individually and collectively." D. Ct. Doc. 1 at ¶ 18; D. Ct. Doc. 80, Ex. 2 at Arts. 1, 2(a). OPEC, like other international organizations, has privileges and immunities under international law.

OPEC's headquarters are located in Vienna, Austria. A 1974 international treaty between OPEC and Austria, known as the OPEC Headquarters Agreement, governs OPEC's status and rights under Austrian law. Pet. App. 42a-74a. The Headquarters Agreement is both a treaty under international law and legislation approved by the Austrian Parliament, made part of Austrian law, and published in the Austrian Gazette. Pet. App. 32a; App., *infra*, 3a-5a; D. Ct. Doc. 56, Ex. 8 at ¶ 12. Article 5(2) of the Headquarters Agreement between Austria and OPEC provides that "service of process shall not take place within the headquarters seat except with the express consent of, and under conditions approved by, the Secretary General." Pet. App. 46a. Both Austria and the United States have entered into headquarters agreements with other international organizations, including the United Nations and the Organization of American States, containing substantially identical provisions regarding service.[1]

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[1] *See* Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, Nov. 21, 1947, 61 Stat. 3416; Headquarters Agreement between the United States and the Organization of American States, May 14, 1992, art. IX(1), http://www.

Proceedings in the District Court

In April 2000, Prewitt filed this case in the United States District Court for the Northern District of Alabama. Prewitt is an Alabama corporation and the owner of a gasoline station in Birmingham, Alabama. The complaint alleges that OPEC and its "co-conspirators" violated the U.S. antitrust laws, and seeks injunctive relief. Prewitt chose to serve OPEC by registered mail as an "unincorporated association" located outside the United States under Rules 4(f) and 4(h) of the Federal Rules of Civil Procedure.

OPEC initially did not appear. As a result, on March 22, 2001, the district court entered a default judgment against OPEC, enjoined OPEC from further activities deemed to violate the U.S. antitrust laws, and extended the injunction to any persons "in active concert and participation" with OPEC "who receive actual notice" of the injunction. Thereupon, OPEC made a special appearance and moved for post-judgment relief under Rule 60(b). The district court vacated the default judgment "[s]o that service of process and jurisdictional issues may be considered by the Court in an adversarial context."[2]

On June 29, 2001, OPEC moved to dismiss the complaint. With respect to the sufficiency of service, OPEC submitted detailed evidence of Austrian law under Federal Rule of Civil

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oas.org/legal/english/docs/BilateralAgree/us/sedeusa.htm; Agreement between the Republic of Austria and United Nations Regarding the Seat of the United Nations in Vienna, Nov. 29, 1995, 2023 U.N.T.S. 254, 259; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418; *see also* C.A. Brief of Amicus Curiae Rep. of Austria (listing agreements); C.A. Brief of Amicus Curiae Org. of American States.

[2] Prewitt claimed federal question jurisdiction. OPEC denied that the district court had either subject matter or personal jurisdiction. Because of the failure of service, the courts below never reached the jurisdictional issues (or other defenses) and they are not presented here.

Procedure 44.1. OPEC proved that Prewitt's attempt to serve OPEC was prohibited by Austrian law and, therefore, was ineffective under Federal Rule of Civil Procedure 4(f)(2)(C). In addition, the Austrian Government wrote a letter directly to the district court confirming that Austrian law prohibits the method of service attempted by Prewitt. App., *infra*, 3a-5a (letter to district court); D. Ct. Doc. 80, Ex. 4 (diplomatic note to OPEC). The Austrian Government explained:

> Under both Austrian law and international agreements concluded between Austria and international organisations based in Vienna, service of legal process to . . . international organisations entitled to privileges and immunities in general, and OPEC in particular, may only be effectuated through diplomatic channels, i.e. with the assistance of the Federal Ministry for Foreign Affairs. As a consequence, any other form of service to said persons or international organisations is to be considered contrary both to Austrian and international law.
>
> The Austrian Law on the Service of Legal Documents ("Zustellgesetz") provides in its Para. 11 (2) that the service of legal documents to . . . international organisations who are entitled to privileges and immunities shall be carried out with the assistance of the Federal Ministry for Foreign Affairs. This excludes any other form of service of legal documents on such international organizations, including OPEC.
>
> Specifically, with respect to service on OPEC, Article 5 (2) of the Agreement between the Republic of Austria and the OPEC regarding the headquarters of the OPEC provides that "the service of legal process . . . *shall not* take place within the headquarters seat except with the express consent of, and under condition[s] approved by, the Secretary General" (emphasis added). This international agreement . . . is an integral part of Austrian law . . . .

> As a result, any form of service on OPEC at its headquarters in Vienna that is not effectuated in accordance with the above-quoted procedure is to be considered contrary both to Austrian and international law. Such service has to be regarded as invalid and, therefore, also as "prohibited by Austrian law," without though implying criminal sanctions.

The District Court's Decision

On August 2, 2002, the district court granted OPEC's motion to dismiss for failure of service. The court "conclude[d] that OPEC was not effectively served even though it actually received the summons and complaint, as unconsented to service by registered mail on OPEC is prohibited by Austrian law." Pet. App. 36a. The district court explained that "[t]he [Federal Rules of Civil Procedure] reflect a clearly expressed diplomatic policy choice of Congress to respect the normative and, ultimately, the legislative, decisions of foreign sovereigns." *Id.*

The Post-Judgment Motion for Alternative Service

Prewitt moved to amend the judgment to authorize alternative service of process under Federal Rules of Civil Procedure 4(f)(3) and 59(e). Prewitt asked the district court to direct service on OPEC at its Vienna headquarters by one of four methods: registered mail, courier, email, and facsimile. OPEC argued that Austria had passed two statutes prohibiting service on OPEC absent consent and had also stated its official view opposing service without OPEC's express consent. In these particular circumstances, ordering service in violation of Austrian law would "giv[e] offense to Austria, as well as to the eleven sovereign nations who comprise the other party to the Headquarters Agreement."[3] On March 4,

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[3] D. Ct. Docs. 87, 122. OPEC also argued that it was inappropriate for Prewitt to use Rule 59 as a vehicle for advancing a belated motion under

2003, the district court exercised its discretion not to order alternative service in the manner Prewitt requested. Pet. App. 38a.

The Court of Appeals' Decision

A unanimous panel of the United States Court of Appeals for the Eleventh Circuit affirmed. The court of appeals held that Prewitt's attempted service of process upon OPEC by registered mail was ineffective. It reasoned that Federal Rule of Civil Procedure 4(f)(2)(C)(ii) "clearly states that service of process by registered mail is only authorized where not prohibited by foreign law" and that Austrian law "expressly prohibits all service of process upon OPEC within the headquarters seat that has not been consented to by the Secretary General." Pet. App. 15a.[4]

Turning to Federal Rule of Civil Procedure 4(f)(3), the court of appeals considered whether the district court had discretion under this rule to decline to order alternative service. Following the decision of the United States Court of Appeals for the Ninth Circuit in *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (2002), the court of appeals "join[ed] [its] sister circuit in holding that the district court's denial of a motion for alternative service of process under Fed. R. Civ. P. 4(f)(3) is subject to an abuse of discretion standard [of review] because the plain language of the rule stipulates that the district court 'may' direct alternative means of service." Pet. App. 7a. Applying that standard, the court of appeals held that the "district court did not abuse its discre-

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Rule 4(f)(3) and that OPEC is not an "unincorporated association" subject to service under Rule 4(f). D. Ct. Doc. 122.

[4] In addition, the court of appeals reasoned that service by registered mail was invalid under Federal Rule of Civil Procedure 4(f)(2)(A), which permits service in another country "in a manner prescribed by the law of the foreign country," because Austrian law did not "prescribe" that manner of service on OPEC. Pet. App. 15a-17a.

tion in denying Prewitt's motion to authorize alternative means of service." Pet. App. 7a, 21a. The court of appeals explained that "the failure to obtain OPEC's consent would constitute a substantial affront to Austrian law," which "clearly provides protection to OPEC as an international organization . . . and also requires that any service of process from abroad be effected through Austrian authorities." Pet. App. 20a, 21a. Finally, the court of appeals stated:

> We do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ P. 4(f)(3) that is in contravention of a foreign law. Rather, we are satisfied that under the facts and circumstances of this case, directing service of process would constitute a clear abuse of discretion.

Pet. App. 21a n.21 (emphasis court's).

REASONS FOR DENYING REVIEW

The court of appeals' decision is correct and does not conflict with the decisions of this Court or any other court of appeals. The court of appeals below correctly held that the district court had discretion under Federal Rule of Civil Procedure 4(f)(3) not to order alternative service and that "there is no abuse of discretion here." Pet. App. 19a. Prewitt's suggestion that this fact-bound decision merits this Court's review rests entirely on an erroneous reading of the opinion of the court of appeals.

Prewitt claims that the court of appeals "holds that whenever a foreign state enters into an agreement designed to insulate an entity located within that state from service in U.S. courts, that agreement is always effective." Pet. 15. On this premise, Prewitt contends that the court of appeals' decision misreads Rule 4(f)(3), conflicts with the Ninth Circuit's decision in *Rio Properties*, and creates a "massive loophole" that allegedly allows a parade of private law-

breakers to avoid service with the connivance of foreign governments. Pet. 7-8.

The petition mischaracterizes the court of appeals' decision. The court of appeals did *not* hold that Rule 4(f)(3) obligates the district courts to respect every provision of foreign law, far less every agreement between every government and every organization. Rather, the court of appeals was clear about the limits of its ruling: "We do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ. P. 4(f)(3) that is in contravention of a foreign law." *See* Pet. App. 21a n.21 (emphasis court's). Thus, the court of appeals correctly reads Rule 4(f)(3) as a grant of permissive authority, a reading entirely consistent with the Ninth Circuit's decision in *Rio Properties* that creates no division among the courts of appeals.

The decision below does no more than affirm a district court's denial of service on OPEC as an exercise of that court's informed *discretion*. Because it carefully limits its reasoning to the special circumstances of international organizations and reserves the district courts' power to order alternative service in appropriate circumstances, the decision creates no shield behind which private lawbreakers could plausibly exempt themselves from service of process. The petition does not merit this Court's review.

I. THE COURT OF APPEALS' DECISION IS CORRECT

The court of appeals correctly held that, in the particular factual circumstances of this case, the district court did not abuse its discretion by declining to order alternative service on OPEC in Austria in violation of Austrian law. By its terms, Rule 4(f)(3) vests discretion in the district court, providing only for such alternative service "as *may* be directed by the [district] court." (Emphasis added.) Nothing in the text of the Rule obligates the district court to direct alternative

service in every case or precludes the district court from considering such factors (including considerations of foreign law and sovereignty) as it deems relevant to its decision whether to direct service in a particular case.[5]

The district court's judgment that the circumstances here did not justify authorization of additional methods of service was well within the scope of reasonable discretion. Prewitt had asked the district court to override the express terms of the OPEC Headquarters Agreement, an Austrian treaty and statute identical in substance to the treaties the United States and Austria have executed in connection with the establishment of the United Nations headquarters. Such headquarters agreements between host countries and international organizations are a standard mechanism to facilitate discussions and cooperative efforts between nation states. Indeed, the specific service provision in Article 5(2) of the OPEC Headquarters Agreement "is commonly found in numerous other Headquarters Agreements between sovereign states and international organizations around the world." Pet. App. 13a n.12.

The OPEC Headquarters Agreement is explicit, it was validly enacted into Austrian law by the Austrian Parliament, and its application to OPEC is beyond doubt. The challenge that service on OPEC would have presented to Austrian sovereignty is tangible. Indeed, the Austrian Government had directly communicated to the district court its official opposition to service on OPEC except in accordance with the OPEC Headquarters Agreement. App., *infra*, 3a-5a. In these unique circumstances, the court of appeals correctly concluded that the district court's decision to refrain from authorizing

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[5] To the contrary, the text of the Rule sets forth only one constraint on the district courts' discretion: a district court ordering service in a particular case must ensure that such service is not "prohibited by international agreement." OPEC did not contend that the Headquarters Agreement was an "international agreement" within the meaning of the Rule.

alternative service in contravention of foreign law was not an abuse of discretion.[6]

Prewitt misstates the holding below by claiming that the court of appeals established an absolute bar against service abroad in violation of foreign law. The court below did no such thing.[7] To the contrary, the court of appeals affirmatively disclaimed the reading Prewitt now advances. It is difficult to conceive of language less equivocal than "[w]e do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ. P. 4(f)(3) that is in contravention of a foreign law." Pet. App. 21a n.21 (emphasis court's).[8] The court of appeals did not purport to answer any

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[6] Another unique factor faced by the district court was the reality that an antitrust lawsuit against OPEC would raise "significant diplomatic considerations" for the United States, involving "defense policy, energy policy [and] foreign policy." *See* Prepared Statement of the Federal Trade Commission, *Solutions to Competitive Problems in the Oil Industry*, before the House Committee on the Judiciary (Mar. 29, 2000) at 4-5, *available at* http://www.ftc.gov/os/2000/03/opectestimony.htm (approved unanimously).

[7] The petition devotes several pages to one sentence in the opinion below: "On these facts, we cannot read 4(f)(3) as permitting that which has already been specifically prohibited under 4(f)(2)." Pet. 18-21. This sentence, however, has nothing to do with the issue on which *certiorari* has been sought. In this sentence, the court below held only that service by registered mail cannot be effected under Rule 4(f)(3) because registered mail is addressed in Rule 4(f)(2) and Rule 4(f)(3) only addresses "other means" of service. Pet. App. 18a-19a. Prewitt does not even claim that a conflict exists on this modest question of procedure with no policy import whatever.

[8] Accordingly, the court of appeals did not read the Advisory Committee Notes to supplant district court discretion under Rule 4(f)(3) to order service in violation of foreign law in an appropriate case. Pet. 21-23. Instead, it referenced the Notes' guidance to "minimize[] offense to foreign law" as a touchstone when considering the propriety of the district court's decision to deny alternative service that would have caused a "substantial affront" to a specific Austrian law expressly prohibiting such service on the specific international organization sought to be served. Pet.

question beyond whether the district court's decision denying alternative service on OPEC constituted an "abuse of discretion." Pet. App. 7a, 19a, 21a. The decision below, which does nothing more than affirm the district court's application of Rule 4(f)(3) to the "facts and circumstances of this case," does not merit this Court's review. Pet. App. 21a n.21; *see also id.* at 3a ("in this case"); 7a ("under the circumstances here"); 19a ("[o]n these facts"); 21a ("[i]n this case").

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT

Contrary to Prewitt's assertion, the decision below does not conflict with the decision of the Ninth Circuit in *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002). The supposed conflict depends on Prewitt's erroneous view that the court of appeals erected an absolute bar against ever authorizing Rule 4(f)(3) service in contravention of foreign law. As the court of appeals expressly disavowed that position, there can be no conflict.[9]

App. 20a. Prewitt, on the other hand, cites the Advisory Committee Notes for the proposition that "one of the purposes of Rule 4(f)(3) was to prevent foreign courts or other authorities from attempting to frustrate service . . . of a complaint seeking . . . to enforce the antitrust laws of the United States." Pet. 15-16. But, the Notes do not say that a district court must direct service in contravention of foreign law in any and all antitrust cases. To the contrary, the Notes make clear that this example is simply one of the "circumstances that *might* justify the use of additional methods" and "the court *may* direct" alternative service "[i]n such cases." (Emphasis added.)

[9] Even if there were a conflict between the two appellate courts about the discretion of district courts under Rule 4(f)(3) to order alternate service in contravention of foreign law, this case would present a poor vehicle to resolve it. At least two antecedent issues that OPEC argued below—and preserves here as alternative grounds supporting the decision below—could prevent this Court from reaching that question. First, it was improper for Prewitt to wait deliberately until after the district court had

In *Rio Properties*, the Ninth Circuit affirmed an order authorizing Rule 4(f)(3) service on a Costa Rican internet company by email and at two places in the United States. 284 F.3d at 1012-13. The Ninth Circuit had no occasion to analyze the propriety of a decision to deny alternative service in the face of an express prohibition by a foreign state. The court of appeals properly distinguished *Rio Properties* as "not at all applicable to the circumstances here." Pet. App. 20a.

In any event, the discussion in *Rio Properties* fully comports with the analysis below. Indeed, in articulating the central role of district court discretion in Rule 4(f)(3), the court of appeals expressly followed *Rio Properties* stating, "[W]e join our sister circuit in holding that the district court's denial of a motion for alternative service of process under Fed. R. Civ. P. 4(f)(3) is subject to an abuse of discretion standard because the plain language of the rule stipulates that the district court 'may' direct alternative means of service. *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002)." Pet. App. 7a. Similarly, the Ninth Circuit in *Rio Properties* was unequivocal that "we commit to the sound discretion of the district court the task of determining when the particularities and necessities of a given case require alternative service under Rule 4(f)(3)." 284 F.3d at 1016. That commitment encompasses the power to determine that the "particularities and necessities of a given case" *do not warrant* alternative service—the precise conclusion reached by the trial court here and affirmed on appeal.

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already dismissed its case before raising the Rule 4(f)(3) issues through a Rule 59(e) motion for post-judgment relief. Second, OPEC is not an "unincorporated association" capable of being served under any prong of Rule 4(f). *See Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 114 S. Ct. 855, 862 (1994) (a prevailing party may "defend a judgment on any ground properly raised below"); *Jones v. U.S.*, 527 U.S. 373, 119 S. Ct. 2090, 2105-06 (1999).

III. THE HOLDING BELOW APPLIES ONLY IN NARROW CIRCUMSTANCES AND DOES NOT WARRANT THIS COURT'S REVIEW

A. The Decision Below Is Fact-Bound and Its Application Is Limited to Extraordinary Circumstances Involving International Organizations of Sovereigns

Prewitt claims that the court of appeals' holding allows "*any* foreign government [to] agree with *any* organization located within its borders" to preclude U.S. service. Pet. 7 (emphasis added). In fact, the decision below nowhere suggests that service could be frustrated by agreements between sovereigns and private "nationals, business organizations and unincorporated associations." Pet. 10. Rather, the court of appeals relied on the sovereign character of the OPEC Headquarters Agreement, which "was enacted into law by resolution of the Austrian Parliament" (Pet. App. 13a), as well as the special character of "international organizations such as OPEC," which are governed by a special provision of Austrian law regulating service on "international organizations that enjoy privileges and immunities under international law." Pet. App. 17a (quoting Austrian Service Act, ¶ 11(2), App., *infra*, 2a). Thus, the only plausible application of the decision below is to those extraordinary circumstances where a sovereign, serving as the host to an international organization of sovereign states, expressly establishes conditions of service through formal acts of state such as treaties and statutes.[10]

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[10] Thus, the court of appeals did not create a "loophole" in the service rules permitting "unscrupulous foreign governments . . . to insulate entities within their borders from liability for wrongdoing in U.S. courts," as Prewitt would have it. Pet. 9. The case below did not involve any allegation that the decision of the Government of Austria in 1974 to enter into a headquarters agreement with OPEC involved any less scrupulous a

Nothing in the decision below permits "any foreign country to completely protect any person or organization within its borders from the U.S. courts." Pet. 11. To the contrary, the court of appeals carefully restricted its decision to the "facts and circumstances of this case." The limited scope of the decision below fully preserves the ability of a district court to authorize service by alternative means in circumstances where a rogue nation seeks to insulate criminal elements within its borders from judicial process. The propriety of Rule 4(f)(3) service in the hypothetical circumstances imagined by Prewitt was neither presented to nor decided by the courts below, and may be left safely to the district courts to address in the first instance should such circumstances ever arise.[11] Accordingly, Prewitt's claim that the opinion below presents a question of "exceptional importance" (Pet. 13) is misconceived.

B. The Decision Below Does Not Present Any FSIA Question

Prewitt also claims that the decision below would subvert the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602 *et seq.* (the "FSIA"), by "completely immuniz[ing] corporations or unincorporated associations" from liability under the FSIA. Pet. 12. But Prewitt did not sue either OPEC or its member countries under the FSIA, and did not attempt to serve those countries or OPEC under the

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decision than the decision of the United States to enter into a substantially identical agreement with the United Nations.

[11] It is more than hyperbolic to compare the invocation by an organization of sovereign nations of standard headquarters agreement language to "evasion of service" by the Mafia or the Cali drug cartel, Pet. 10, particularly when the United States has included the same clauses in its own headquarters agreements and surely expects them to be both invoked and honored. Accordingly, the application of law by the court below to the facts presented here does not "run[] counter to the policy condemning attempts to evade or obstruct service of process." Pet. 9.

special service provisions in the FSIA that it now cites. Pet. 13 (citing 28 U.S.C. § 1608(b)). Instead, Prewitt crafted a strategy designed to avoid the question of FSIA immunity by pursuing OPEC as an unincorporated association subject to Rule 4(f) service—completely outside the scheme of the FSIA. The lawsuit as crafted by Prewitt thus came to focus on the district court's discretion under Rule 4(f)(3) and the opinion below could not possibly implicate the FSIA's "theory of sovereign immunity." Pet. 12. Likewise, neither Austria's sovereign decision to enter into a headquarters agreement with OPEC nor the United States' sovereign decision to enter into headquarters agreements with the United Nations and the Organization of American States poses any possible threat to the restrictive theory of sovereign immunity. More fundamentally, just like Prewitt's other claims, its FSIA argument hangs upon the faulty premise that the court below created an absolute bar against service abroad in violation of all "agreements" entered by foreign governments. Since the court of appeals expressly held that a district court has discretion under Rule 4(f)(3) to order service in violation of foreign law, the decision below announces no rule that could possibly subvert the FSIA. Pet. App. 21a n.21.[12]

In the end, Prewitt's FSIA argument boils down to the assertion that it is "incongruous[]" for the district court to decline to order service on OPEC when it would have been possible for Prewitt (if it had chosen to do so) to serve "OPEC's fifteen [sic] member states" under the FSIA. Pet. 13. This assertion, however, is nothing more than a policy objection to the political and diplomatic judgments embedded in the service provisions of the OPEC Headquarters Agreement, the United States' Headquarters Agree-

[12] Prewitt's FSIA arguments also miss an obvious difference between service on states and service on international organizations. Only international organizations have headquarters and, thus, only international organizations have headquarters agreements.

ment with the United Nations, and "numerous other Headquarters Agreements between sovereign states and international organizations around the world." Pet. App. 13a n.12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 28, 2004

APPENDIX

APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 4. Summons

* * * *

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

* * * *

Long Title

Federal Law of April 1, 1982 on the Service of Official Documents (Service Act)

StF: BGB1. No. 200/1982

Change
as last amended by: BGB1. No. 357/1990 (NR: GP XVII RV 1089 AB 1350 p. 145 BR: AB 3889 p. 531.)

BGB1. I No. 158/1998 (NR: GP XX AB 1167 p. 119 BR: AB 5676 p. 642.)

SECTION I
General Terms and Conditions
Special Cases of Service

§ 11. (1) Service of process abroad shall be undertaken in accordance with existing international agreements or else in the manner provided for by the laws or other legal provisions of the state in which service is to be effected, or as provided by international practice, if necessary with the participation of Austrian representing authorities.

(2) The mediation of the Federal Ministry for Foreign Affairs shall be enlisted in undertaking service of process on foreigners or international organizations that enjoy privileges and immunities under international law, regardless of their place of residence or headquarters.

(3) Service of process on members of entities that are sent abroad to provide aid at the request of an international organization or the League of Red Cross Associations shall be undertaken by way of the entity's principal.

Austrian Embassy
3524 International Court, NW
Washington, DC 20008-3027

[Filed Jan 10, 2002]

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Ref. No. 6.50/55/01

To the
US District Court for the
Northern District of Alabama
Southern Division
Attention Clerk of the Court
Hugo L Black US Court House
1729 N Fifth Avenue
Birmingham, AL 35203

01-08-2002

Re: Prewitt Enterprises, Inc. vs. Organization of the Petroleum Exporting Countries ("OPEC"), Civil Action Number 00-C-0865-S

Dear Sir,

The Embassy of Austria has been instructed by the Austrian Federal Ministry for Foreign Affairs in Vienna, to inform the Hororable Court as follows:

Under both Austrian law and international agreements concluded between Austria and international organisations based in Vienna, service of legal process to foreign citizens or international organisations entitled to privileges and immunities in general, and OPEC in particular, may only be effectuated through diplomatic channels, i.e. with the assistance of the Federal Ministry for Foreign Affairs. As a consequence, any other form of service to said persons or international organisations is to be considered contrary both to Austrian and international law.

The Austrian law on the Service of Legal Documents ("Zustellgesetz") provides in its Para. 11 (2) that the service of legal documents to foreign citizens or international organisations who are entitled to privileges and immunities shall be carried out with the assistance of the Federal Ministry for Foreign Affairs. This excludes any other form of service of legal documents on such international organisations, including OPEC.

Specifically, with respect to service on OPEC; Article 5 (2) of the Agreement between the Republic of Austria and the OPEC regarding the headquarters of the OPEC provides that "the service of legal process, including the seizure of private property, *shall not* take place within the headquarters seat except with the express consent of, and under condition approved by, the "Secretary General" (emphasis added). This international agreement, which was approved by the Austrian Parliament in accordance with Article 50 of the Austrian Constitution, is an integral part of Austrian law; the provision concerned corresponds to similar provisions of other headquarters agreements with international organisations based in Vienna (such as the United Nations Organization (Office at Vienna), the United Nations Industrial Development Organization and the International Atomic Energy Agency).

As a result, any form of service on OPEC at its headquarters in Vienna that is not effectuated in accordance with the above-quoted procedure is to be considered contrary both to Austrian and international law. Such service has to be regarded as invalid and, therefore, also as "prohibited by Austrian law", without though implying criminal sanctions.

The Federal Ministry for Foreign Affairs in Vienna through the intermediary of the Austrian Embassy in Washington, DC would like to state that in making this submission to the

Honorable Court it is not the intent of the Government of Austria to submit itself to the jurisdiction of the Court.

Sincerely yours,

/s/ Melitta Schubert
MELITTA SCHUBERT
Deputy Chief of Mission

[SEAL]